Filed 1/25/10 Beck v. Prana Eight Properties CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARIANNE BECK et al., Plaintiffs and Respondents, v. PRANA EIGHT PROPERTIES, LLC, et al., Defendants and Appellants.	A124883, A125217 (San Francisco City & County Super. Ct. No. CGC-08-483098)

Plaintiffs Marianne Beck, Phil Head, Kurt Mueller, Ryan McCauley, and John Tynan are tenants in two adjacent properties owned by defendants Prana Eight Properties, LLC (Prana Eight) and James Vlahos. In 2008, plaintiffs learned defendants, in settling a lawsuit between them, had extinguished an easement that permitted the maintenance of a fire escape attached to the back of one of the properties and had made arrangements to demolish the fire escape, which plaintiffs used for access to a yard shared by the properties. Plaintiffs filed an action for a declaration regarding their rights in the easement and to enjoin demolition of the fire escape. While the lawsuit was pending, defendants demolished the fire escape, after obtaining appropriate permits from the City.

Defendants then filed a special motion to strike under Code of Civil Procedure section 425.16, the anti-SLAPP statute. [1] In opposing the special motion, plaintiffs

[1] All statutory references are to the Code of Civil Procedure. "SLAPP" stands for "strategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1.)

argued their action was not covered by the anti-SLAPP statute and, in any event, they could demonstrate a probability of prevailing in the action by satisfying the justiciability requirements for declaratory relief. Although the trial court found the action to be covered by the anti-SLAPP statute, it concluded plaintiffs had demonstrated they were likely to prevail in their lawsuit. We reverse.

I. BACKGROUND

Plaintiffs' complaint alleges they are long-term tenants of two buildings located at 800–808 Lyon Street in San Francisco, referred to as "Property 1" and "Property 2." Property 1 is a multi-unit building sharing a common boundary with Property 2, a single-family dwelling. The complaint alleges Prana Eight owns both properties, while Vlahos claims an equitable title to Property 2.

In 2006, Vlahos is alleged to have "fraudulently sued" Prana Eight to quiet title in Property 2, with the lawsuit terminating in a stipulated judgment. The stipulated judgment (1) settled title to Property 1 in Prana Eight and title to Property 2 in Vlahos, (2) extinguished a purportedly illegal easement running between the two properties, and (3) required Prana Eight to remove an encroaching deck from Property 1. The extinguished easement had been granted many years ago "for fire escape purposes and for ingress to and from the present fire escape attached to" Property 1 and "for general ingress and egress purposes in conjunction with" the fire escape. The "deck" referred to in the stipulated judgment was the fire escape authorized by the easement, attached to the rear of Property 1.

In April 2008, Prana Eight informed plaintiffs it intended to remove the fire escape, which had long been used by plaintiffs for recreation and access to the backyard of Property 2. The complaint sought declaratory relief that "the [stipulated] Judgment is invalid and Plaintiffs have rear ingress/egress to Property 1 pursuant to the Easement" and an injunction prohibiting defendants from demolishing the fire escape.

Defendants filed a special motion to strike under the anti-SLAPP statute. The motion argued (1) the lawsuit was covered by the anti-SLAPP statute because, in challenging the validity of the judgment, it arose from the right to petition; and

(2) plaintiffs could not demonstrate they would prevail because the extinguished easement was invalid *ab initio* and the fire escape violated San Francisco land use ordinances. A declaration submitted with the motion explained the fire escape had been built in the 1950's under a program designed to provide emergency exiting for certain existing buildings. Even at the time, the housing code required multi-story buildings to have a galvanized steel fire escape located over a public right-of-way, normally on the street-side façade of the building. In contrast, the fire escape at issue here was built of wood on an interior façade of Property 1 and was supported by the roof of Property 2. More recently, the fire escape, which had begun to decay, had been cited by the city fire marshal and San Francisco Department of Building Inspection, Housing Inspection Services, and the city had issued a notice of violation requiring the owners to bring the building into compliance with the regulations requiring a metal fire escape located on a right-of-way. By the time the special motion to strike was filed, the fire escape had been removed pursuant to a city permit.

Plaintiffs argued in response (1) the lawsuit did not address activity protected under the anti-SLAPP statute, and (2) they would prevail because they had demonstrated entitlement to a declaratory judgment. As to the latter argument, plaintiffs argued they were required only to demonstrate they satisfied the justiciability requirements of declaratory relief, not that the relief would be favorable. In their words, "[t]he actual controversy surrounding the validity of the 1959 Easement gives rise to plaintiffs' cause of action for declaratory judgment. Whether or not plaintiffs will receive a favorable decision is irrelevant." The opposition was accompanied by a series of declarations explaining plaintiffs' tenancy at Property 1 had always included access to the fire escape and a yard below that was shared with Property 2. They claimed the application for the permit for demolition of the fire escape was "replete with misrepresentations and omissions" and disputed defendants' claim the easement was invalid. A declaration by their attorney described the legal proceedings leading to the granting of defendants' permits for demolition of the fire escape and construction of a new metal fire escape at the front of the building.

The trial court denied the special motion to strike, concluding the action did concern protected activity under the anti-SLAPP statute but finding plaintiffs had established a probability of prevailing on their claim.

II. DISCUSSION

Section 425.16 was intended as "a mechanism for screening out . . . at an early stage" meritless lawsuits brought for the purpose of discouraging constitutionally protected expressive activity. (*Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1184; § 425.16, subd. (a).) To this end, the anti-SLAPP statute requires the court to dismiss a covered action pursuant to a "special motion to strike" unless the plaintiff is able to demonstrate a probability of prevailing in the lawsuit. (§ 425.16, subd. (b)(1).) Accordingly, a special motion to strike is subject to a two-step analysis, in which the court asks, first, whether the defendant has made the threshold showing the challenged cause of action "aris[es] from any act . . . in furtherance of the person's right of petition or free speech . . . ." (*ibid.*), as that concept is defined by the statute, and, if so, whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.)

Review of an order granting or denying a motion to strike under section 425.16 is de novo. "We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' [Citation.] However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

Because plaintiffs do not dispute the trial court's conclusion that this lawsuit concerns protected activity, we make no ruling with regard to that issue. We note, however, the trial court's conclusion appears to be correct under *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, footnote 5, which holds section 425.16 applicable to any action seeking to set aside a judgment, reasoning the

judgment resulted from the exercise of the right to petition. (*Wollersheim*, at p. 648 ["thus, it literally applies to any direct attack on the *judgment* in the prior action, which resulted from [the defendant's] petition activity"].)

Accordingly, if plaintiffs' action is to survive the motion to strike, they were required to demonstrate they are likely to prevail. In making this showing, plaintiffs first argue they can demonstrate a likelihood of success merely by showing they satisfy the jurisprudential preconditions to the award of a declaratory judgment, regardless of whether that judgment is favorable. Alternatively, they argue they are likely to be awarded a favorable judgment.

A. *An Actual Controversy*

As an initial matter, it is doubtful plaintiffs will be able to demonstrate they are entitled to a declaratory judgment of any sort. " 'The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.' " (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79; § 1060.) "Whether a case is founded upon an 'actual controversy' centers on whether the controversy is justiciable. 'The principle that courts will not entertain an action which is not founded on an actual controversy is a tenet of common law jurisprudence, the precise content of which is difficult to define and hard to apply. The concept of justiciability involves the intertwined criteria of ripeness and standing. A controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' " (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540.)

"Ripeness is aimed at 'prevent[ing] courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of . . . opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes.' " (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 63.) "The mere fact that [the parties] disagree over [a legal issue] does not create a justiciable

controversy. Courts may not render advisory opinions on disputes which the parties anticipate might arise but which do not presently exist. [Citations.] For declaratory relief, the party must show it either has suffered or is about to suffer an injury of 'sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.' " (*Stonehouse Homes LLC v. City of Sierra Madre, supra,* 167 Cal.App.4th at p. 542.)

Although this controversy was actual and ripe at the time it was filed, the demolition of the fire escape rendered it effectively pointless. At the time of filing, defendants were making preparations to deprive plaintiffs of their use of a fire escape in which, plaintiffs believed, they had legal rights. This created a basis for plaintiffs' request for a judgment declaring those rights and an injunction against destruction of the fire escape. That controversy disappeared, however, the instant the fire escape was taken down. Now, the request for an injunction is moot, since there is no longer a fire escape whose demolition can be enjoined. Further, the dispute over plaintiffs' rights in the easement and use of the fire escape has become merely hypothetical. With the fire escape gone, the legal issue surrounding the fire escape is whether plaintiffs *had* a right to use it. While this issue may be relevant in determining whether defendants' destruction of the fire escape violated a legal duty to plaintiffs, it has no future implications for the rights of the parties. "Declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs." (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497.) Because there is no indication any of the parties plan to rebuild the fire escape—or even that the fire escape could legally be rebuilt—the issue of plaintiffs' legal rights in the easement is without future consequence.[2] As a result, this appears to be an action that " 'has . . . passed the

[2] In their brief, plaintiffs assert a temporary scaffolding has been erected in place of the fire escape. The citation to the appellate record claimed to support this assertion does not, in fact, support it, and we find no other evidence in the appellate record of a scaffolding having been erected. Even if such proof had been provided, however, the scaffolding could not legally serve as a fire escape and therefore would not be within the terms of the easement.

point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' " (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.)

During oral argument, plaintiffs argued this matter is not moot because they contend the easement should be construed to give them the right to use the yard of Property 2 or, alternatively, they should be granted an equitable easement in the yard. Plaintiffs have provided no legal authority to support the proposition that rental tenants of a dominant tenement can acquire legal or equitable easement rights in a servient tenement, and we are unaware of any such authority. Further, this particular easement seems unlikely to support their claim. Its sole purpose was to permit the maintenance and use of the fire escape. While the existence of the easement may have facilitated plaintiffs' use of the yard, the easement did not grant any use rights in the yard to Property 1—except perhaps, by necessary inference, the right to cross the yard to escape a fire. We need not decide this issue, however, because there is no evidence in the record the tenants of Property 1 have been denied access to the yard of Property 2. On the contrary, at oral argument their counsel conceded the tenants continue to have access to the yard. As a result, any claim regarding access to the yard is not yet ripe. (E.g., *Stonehouse Homes LLC v. City of Sierra Madre*, *supra,* 167 Cal.App.4th at p. 542 ["Courts may not render advisory opinions on disputes which the parties anticipate might arise but which do not presently exist"].)

B. *Likelihood of Prevailing*

1. *Sufficiency of Demonstrating Entitlement to Declaratory Relief*

Even assuming plaintiffs could demonstrate their action continues to present an actual controversy, they have not demonstrated a likelihood of success merely because they satisfy the justiciability requirements for a declaratory judgment.

" 'In order to establish a probability of prevailing on the claim [citation], a plaintiff responding to an anti-SLAPP motion must " 'state[] and substantiate[] a legally sufficient claim.' " [Citations.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of

facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' " (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713–714.)

Plaintiffs cite no legal authority for the proposition they can show a probability of prevailing merely by demonstrating an entitlement to *some* declaratory relief, even if unfavorable. Nor have we found such authority. On the contrary, the anti-SLAPP decisions addressing declaratory relief actions consistently require the plaintiff to demonstrate the probability of declaratory relief *in the plaintiff's favor*. (E.g., *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 774, 784; *City of Santa Monica v. Stewart, supra,* 126 Cal.App.4th at pp. 75–76; *Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252, 1260–1262.)

The justiciability requirements underlying declaratory relief are not different from those underlying other types of relief; every action must involve a justiciable controversy. The requirement of justiciability is ordinarily not an issue in a typical suit for money damages, however, because the wrong that created the claim for money damages self-evidently provides the justiciable dispute. A plaintiff must make a preliminary showing of justiciability in a declaratory relief action only because such actions often do not involve the type of harmful event that underlies a suit for money damages and creates a justiciable controversy. Therefore, for plaintiffs to argue they can prevail merely by satisfying the justiciability requirement for declaratory relief, and thereby obtaining a declaration of rights, is no different from arguing a plaintiff in a suit for damages can prevail merely by securing a judgment, even if that judgment is for the defendant. Clearly, just *any* judgment is not enough.

2. *Probability of Receiving Favorable Declaratory Relief*

Although plaintiffs did not argue in the trial court they could demonstrate entry of favorable declaratory relief, they do make that argument here.

"[A]lthough by its terms section 425.16, subdivision (b)(1) calls upon a court to determine whether 'the plaintiff has established that there is a *probability* that the plaintiff will prevail on the claim' (italics added), past cases interpreting this provision establish that the Legislature did not intend that a court, in ruling on a motion to strike

under this statute, would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities." (*Taus v. Loftus, supra,* 40 Cal.4th at p. 714.) In making this demonstration, a plaintiff must provide affirmative evidence and may not rely on the allegations of the complaint or conclusory statements in its declarations. (*Levy v. City of Santa Monica, supra,* 114 Cal.App.4th at p. 1262.)

Even disregarding plaintiffs' apparent inability to demonstrate a justiciable controversy, they have failed to demonstrate their entitlement to favorable declaratory relief. Defendants' expert's testimony that San Francisco building codes require a fire escape to be located over a public right-of-way is undisputed. The sole purpose of this easement, located over private property, was "for fire escape purposes and for ingress to and from the present fire escape attached to" Property 1 and "for general ingress and egress purposes in conjunction with" the fire escape. An easement that purports to grant use rights inconsistent with local law is invalid. (*Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493–1494.) Accordingly, on the basis of undisputed evidence, the original easement was invalid. While plaintiffs claim an equitable easement in addition to rights under the original easement, they provide no authority holding an equitable easement can be granted providing use rights that are in conflict with local law. In fact, they cite no law governing equitable easements at all.

Because we conclude plaintiffs have failed to demonstrate a probability of demonstrating an entitlement to rights in an easement or equitable easement for a use contrary to local law, we need not address defendants' argument that the easement was unlawful *ab initio* because it was granted while the properties were under common ownership.

III. DISPOSITION

The judgment of the trial court is reversed. The matter is remanded for entry of a judgment striking plaintiffs' complaint under section 425.16 and any further relief consistent with this decision.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Dondero, J.